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No. 81-2305

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PENNZOIL COMPANY,

Petitioner,

v.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, Secretary of Energy,
and the UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS OF THE UNITED STATES

MOTION OF COTTON PETROLEUM CORPORATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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MOTION OF COTTON PETROLEUM CORPORATION
FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Cotton Petroleum Corporation ("Cotton") respectfully moves for leave to file the attached amicus curiae brief in

support of the petition for a writ of certiorari filed by Pennzoil Company ("Pennzoil"). Pennzoil has consented to the filing of this brief but the Respondent has not at this time responded. The letter granting Petitioner's consent has been lodged with the Clerk.

Cotton has a particular interest in this case because the decision below by the Temporary Emergency Court of Appeals ("TECA") addresses the same legal issue raised by Cotton in an action pending in the United States District Court for the Northern District of Oklahoma. Cotton Petroleum Corporation v. Edwards, No. 79-C-217-B. In that case, Cotton has moved for summary judgment on the basis that Ruling 1975-15 was not properly promulgated and cannot be retroactively applied to require Cotton to pay approximately one million dollars in alleged

overcharges. TECA's decision in the instant case, upholding the validity and retroactive application of Ruling 1975-15, has precluded a determination of Cotton's motion in the district court.

Since TECA apparently considered the impact upon Petitioner of the retroactive application of Ruling 1975-15, the Petitioner cannot properly raise, in its brief, the issue of TECA's failure to consider the impact of retroactivity on other members of the industry, such as Cotton. Cotton seeks to submit an amicus curiae brief to inform this Court that TECA's retroactive application of an agency's "interpretative" ruling to the entire industry, without consideration of its impact upon that industry, conflicts with decisions of Courts of Appeals in other circuits and raises an important question of federal law which should be decided by this Court.

For these reasons, Cotton respectfully requests that its motion for leave to file an amicus curiae brief be granted and submits the attached amicus curiae brief for this Court's consideration.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae.....	1
Reasons for Granting the Writ.....	5
1. TECA's Retroactive Application of an Agency "Interpretative" Rule Without Consideration of its Impact Upon the Affected Industry Conflicts With Decisions By By Courts of Appeals For Other Circuits.....	5
2. TECA's Retroactive Application of an Agency "Interpretative" Rule Without Consideration of its Impact Upon the Affected Industry Raises An Important Issue of Federal Law Which Should Be Decided By This Court.....	8
Conclusion.....	9

TABLE OF AUTHORITIES

Page

CASES:

Cotton Petroleum Corporation v. Edwards, No. 79-C-219-B (N.D. Okla., filed April 13, 1979)..... 8

Christmann & Welborn v. DOE, No. 5-79-007 (N.D. Tex., filed Jan. 31, 1979)..... 8

Iowa Power & Light Company v. Burlington Northern, Inc., 647 F.2d 796 (7th Cir. 1981) cert. denied sub nom. Burlington Northern, Inc. v. United States et al., 102 S. Ct. 1253 (1982)..... 6

Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corporation, 534 F.2d 422 (2d Cir. 1975), cert. denied, 97 S. Ct. 79 (1976)..... 7

Mobley v. DOE, No. 78-1073 (W.D. La., filed Aug. 7, 1978)..... 8, 9

Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972)..... 5, 6

United States v. Exxon Corp.,
No. 78-1035 (D.D.C., filed
June 8, 1978)..... 9

OTHER:

Ruling 1975-15, 40 Fed. Reg.
40832 (Sept. 4, 1975)..... passim

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AMICUS CURIAE BRIEF FOR COTTON PETROLEUM
CORPORATION IN SUPPORT OF PETITIONER

Interest of the Amicus Curiae

Cotton Petroleum Corporation ("Cotton") is an independent crude oil

producer and the operator of the North Goose Lake Unit, a secondary recovery unit located in Sheridan County, Montana. Cotton submits this amicus curiae brief in support of the petition for writ of certiorari of Pennzoil Company ("Pennzoil") and also adopts the brief filed by Pennzoil.

The decision of the Temporary Emergency Court of Appeals ("TECA") upholding the validity of Ruling 1975-15 and its retroactive application to the pricing methods utilized by Pennzoil for its Walker Creek Unit has a direct and substantial impact upon Cotton and the other working interest owners of the North Goose Lake Unit. In a 1977 remedial order, Respondent Department of Energy ordered Cotton to repay more than $700,000 for alleged violations of the Mandatory Petroleum Price Regulations as interpreted in Ruling 1975-15. These alleged

overcharges with accrued interest currently exceed $1,000,000.

In April 1979, Cotton brought an action against Respondent in the United States District Court for the Northern District of Oklahoma (No. 79-C-217-B), seeking, inter alia, to set aside the remedial order because it is based upon an invalid agency ruling (Ruling 1975-15). Cotton sought summary judgment on the issue of the validity of Ruling 1975-15 but the district court ordered the motion held in abeyance because the same issue was pending before TECA in the instant case. Cotton has acknowledged to the district court that TECA's decision in the instant case is apparently dispositive of Cotton's claim as to the validity and retroactivity of Ruling 1975-15.

Cotton submits this amicus curiae brief to advise this Court that TECA's decision, while limited in its factual analysis to a consideration of factors unique to Pennzoil, has no such limitations on its legal conclusion. Indeed, TECA holds, without any consideration of the motivation, intent or behavior of, or fairness to, any other member of the industry, that Pennzoil's behavior is, by itself, sufficient to justify the retroactive application of Ruling 1975-15 to the entire industry. Such reasoning disregards the well-established precedents of other Courts of Appeals, raises a substantial issue of federal law and constitutes an independent basis for granting a writ of certiorari.

Reasons for Granting the Writ

1. TECA's Retroactive Application Of An Agency "Interpretative" Rule Without Consideration Of Its Impact Upon The Affected Industry Conflicts With Decisions By The Courts Of Appeals For Other Circuits.

TECA's decision that Pennzoil's behavior supports the retroactive application of Ruling 1975-15 to the entire industry creates a precedent which conflicts with the prevailing body of administrative law in other circuits. No other Court of Appeals has upheld the retroactivity of an agency rule of general application without consideration of the impact on affected parties. On the contrary, the United States Court of Appeals for the District of Columbia enunciated the accepted standards for determining retroactivity in Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972):

> Among the considerations that enter into a resolution of the problem [whether to apply an agency rule retroactively] are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. (Emphasis added).

This same concern is emphasized by the Seventh Circuit. Iowa Power & Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (7th Cir. 1981) cert. denied sub nom. Burlington Northern, Inc. v. United States et al., 102 S. Ct. 1253 (1982) ("Retroactive application of policy is disfavored when . . . the hardship on affected parties will outweigh the public

ends to be accomplished."). Similarly, the Second Circuit has also subscribed to the standards announced by the District of Columbia Circuit. Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corporation, 534 F.2d 422, 452-53 (2d Cir. 1975), cert. denied, 97 S. Ct. 79 (1976) ("Whether retroactively to apply newly-adopted administrative rules is determined by balancing a variety of factors well summarized by Judge McGowan in Retail, Wholesale and Department Store Union v. N.L.R.B.. . . .").

TECA's abrupt and unjustified departure from these precedents creates a direct and irreconcilable conflict among the Courts of Appeals; amid this confusion, agencies are free to engage in retroactive rulemaking without an assessment of the

impact on the affected industry. A writ should issue so that this Court may resolve this conflict and definitively decide this issue.

2. TECA's Retroactive Application Of An Agency "Interpretative" Rule Without Consideration Of Its Impact Upon The Affected Industry Raises An Important Issue Of Federal Law Which Should Be Decided By This Court.

While TECA's decision that Ruling 1975-15 can be retroactively applied is based entirely upon consideration of facts unique to Pennzoil, the effects of this decision are by no means so limited. Indeed, the ramifications of TECA's decision extend beyond the parameters of the instant case to the entire domestic petroleum industry. The validity and retroactive application of Ruling 1975-15 are the fundamental issues in several pending cases involving members of the industry, including Cotton. See, e.g., Cotton Petroleum Corporation v. Edwards, No.

79-C-219-B (N.D. Okla., filed April 13, 1979); Christmann & Welborn v. DOE, No. 5-79-007 (N.D. Tex., filed Jan. 31, 1979); Mobley v. DOE, No. 78-1073 (W.D. Ca., filed Aug. 17, 1978); United States v. Exxon Corp., No. 78-1035 (D.D.C., filed June 8, 1978). TECA's decision preempts the common legal issue in these cases and also determines the fate of hundreds of millions of dollars at stake.

A decision with such wide-ranging consequences and significant impact upon a major industry deserves the review of this Court. The final decision about the retroactive application of Ruling 1975-15 to the industry should be made by this Court.

Conclusion

For the foregoing reasons, Cotton respectfully requests that this Court grant

certiorari in the instant case and reverse the Temporary Emergency Court of Appeals' decision upholding the validity and retroactive application of Ruling 1975-15.

Respectfully submitted,

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